

1. **KANG (Migration) [2017] AATA 799 (18 May 2017)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Kun Young Kang
Ms Hyun Jung Joo
Miss Sue Min Kang

CASE NUMBER: 1602196

DIBP REFERENCE(S): BCC2010/262214

MEMBER: Katie Malyon

DATE: 18 May 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Skilled (Residence) (Class VB) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 886 (Skilled - Sponsored) visas:

- Public Interest Criterion 4020 for the purposes of cl.886.225 of Schedule 2 to the Regulations.

Statement made on 18 May 2017 at 1:36 pm

CATCHWORDS

Migration – Skilled (Residence) (Class VB) visa – Subclass 886 (Skilled - Sponsored) – Bogus document/Misleading information – Skills assessment – Graphic Pre-Press Tradesperson – Issues with duty statement – Misunderstanding with previous employer

LEGISLATION

Migration Act 1958, ss 5(1), 65

Migration Regulations 1994, Schedule 2, Part 886, cl.886.225, Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 3 February 2016 to refuse to grant the applicants Skilled (Residence) (Class VB) visas under s.65 of the *Migration Act 1958* (**the Act**).
6. The applicants applied for the visas on 29 June 2010. The delegate refused to grant the visas on the basis that the first named applicant, Mr Kun Young Kang, did not satisfy the requirements of cl.886.225 of Schedule 2 to the *Migration Regulations 1994* (**the Regulations**) because the delegate concluded that Mr Kang's skill assessment from Trades Recognition Australia (**TRA**) was obtained because of a false or misleading statement, whether or not made knowingly, in Mr Kang's duty statement regarding his employment at Daehengsa Pty Ltd (**Daehengsa**). This followed a teleconference between an officer of the Department based in Seoul, South Korea with Mr Park, the owner of Daehengsa, which is also based in South Korea. As such, the delegate concluded that the TRA assessment was a bogus document and, accordingly, found that Mr Kang did not satisfy Public Interest Criterion 4020 of Schedule 4 (**PIC 4020**) to the Regulations. A copy of the delegate's decision was provided to the Tribunal.
7. The applicants appeared before the Tribunal on 1 March 2017 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Go Kang Park, the owner and Managing Director of Daehengsa, who had flown to Sydney for the hearing. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages. Only Mr Park used the services of the interpreter. The applicants were represented in relation to the review by their registered migration agent, who also attended the hearing.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.886.225 of Part 886 of Schedule 2 to the Regulations for the grant of the visa.
10. Essentially, cl.886.225 requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and,
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and,
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and,

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

11. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the **Attachment** to this decision.

12. *Background*

13. Mr Kang is a 36 year old national of South Korea. Department records show that he first travelled to Australia as a holder of a Subclass 976 Visitor visa in September 2002 for a 3 month holiday and then returned in December 2005 for an 8 month stay on a Working Holiday Subclass 417 visa. He returned again in April 2007 on a Visitor Subclass 976 visa before transitioning to a Student Subclass 570 visa in December 2007. In June 2008, he enrolled in a Diploma of Printing and Graphic Arts (Graphic Pre-Press) and held a Student Subclass 572 visa.
14. To be granted a Subclass 886 visa, Mr Kang had to apply for an assessment of his skills for his nominated skilled occupation from the relevant assessing authority (cl.886.212) and give evidence that his skills had been assessed as being suitable for his nominated skilled occupation (cl.886.223).
15. In his Subclass 886 visa application form, Mr Kang stated that he had applied for an assessment of his skills in the nominated occupation of Graphic Pre-Press Tradesperson ASCO 4911-11. The relevant assessing authority for that occupation is TRA: IMMI 12/068. Mr Kang indicated on his Form 1267 *Application for General Skilled Migration to Australia* that he had obtained a skill assessment from TRA. He also indicated that he had completed a Diploma of Printing and Graphic Arts (Graphic Pre-Press) at the Victory Institute of Professional Training in June 2010 after 2 years of study.
16. Accompanying Mr Kang's application to the Department is a TRA assessment dated 29 November 2009 confirming that his application was successful in the occupation of Graphic Pre-Press Tradesperson 4911-11. While his visa application was being processed, an investigation was conducted by the Department through its office in Seoul, South Korea. As noted in the delegate's decision (a copy of which was provided to Tribunal) an officer from the Department contacted Mr Kang's employer, Daehengsa, to verify his employment claims. The delegate's decision records that the owner of Daehengsa confirmed Mr Kang's employment and said that he worked at the business 7 - 10 years ago when Mr Kang was in his mid-20s. The owner advised the Department that Mr Kang 'did not operate photographic equipment at all': rather, his main duties were arranging printed materials and carrying them to clients. As such, the delegate concluded the duty statement from Daehengsa signed by the company's owner Mr Park appeared inconsistent with the owner's statements and the discrepancies regarding duties performed and Mr Kang's age gave rise to concerns about the truthfulness of his claims and the genuineness of the duty statement provided to TRA as well as the Department.
17. On 18 December 2015, the Department wrote to Mr Kang providing 28 days to comment on the suspected 'on-genuine' information supplied to the Department. He replied on 14 January 2016 enclosing a letter from Mr Park dated 5 January 2016 regarding Mr Kang's employment claims with Daehengsa. In his letter, Mr Park confirms he received a call from an officer of the Department in December 2015. He was asked several questions in relation

to Mr Kang's work history. He notes that he could not remember exactly Mr Kang's previous work experience and told the officer he worked with the company about 10 years ago when, having checked the company's records, he was there 15 years ago. Mr Park opines that he is sure every person 'could not remember accurately the things if they happened 15 years ago'. He also states that he could not remember exactly Mr Kang's previous work experience but, having checked his records, he confirms Mr Kang worked as a 'graphic pre-stress technician such as creative and edit graphic design and concept, image manipulation, brochure and name card making, creative (sic) and modify images using the painting tools and layout implementation'.

18. In considering all of the evidence before the Department, the delegate gave greater weight to information provided spontaneously by Mr Park during his interview than that set out in his later letter provided to the Department. As a result, the delegate was not satisfied as to the truthfulness of Mr Kang's employment claims in the duty statement provided to TRA and the Department.

19. Hearing

20. Mr Kang told the Tribunal that, when 'I first read the delegate's decision, it just did not make sense as it said that I worked there but I didn't work there because it suggested I had provided false information to the Department and to TRA'. He added that it was clear Mr Park had confused him with someone else due to the fact that, at that time, there were many people working for the company and he had left 15 years ago. When he contacted Mr Park to tell him about the result, Mr Park offered to come to the hearing.
21. Mr Park told the Tribunal that he heard Mr Kang had lost his migration application. He said that, when he gave advice to the Department over the phone, he actually thought Mr Kang was already a permanent resident. He said the day he got the call from the officer he was on-site in the factory and 'took the call on a landline'. Mr Park said he was actually working with machinery at the time and 'could not hear very well'. As a result, 'I had to get a female assistant to actually repeat the questions many times'. He added that, because of the 'noise of the machinery in the background, it is clear that there were some errors in the conversation' and he 'thought the questions were about another person'. He explained that 'the machinery makes noise not only because of the motor but also the compressor'. Mr Park opined that, if the previous interview over the phone had been like this one (that is, in the context of a Tribunal hearing), it would have been 'formal and proper'. He added that, in such circumstances, he 'could have given proper evidence and there would have been no misunderstanding as there would have been no noisy machinery. Mr Park concluded his initial comments stating that 'it's quite frustrating because it was my mistake and Mr Kang is suffering because of my mistake'.
22. Mr Park told the Tribunal that, when the officer called, they mentioned Mr Kang's name only once at the beginning and he confused him with a Mr Kim. It did not occur to him that anybody would be calling about Mr Kang because he thought Mr Kang already had permanent residence in Australia. He said Mr Kang had worked with him 15 years before the call from the officer so it just did not occur to him when the caller said the person's name only once that they were actually calling about Mr Kang. It all too difficult with the coating machinery's background noise and he could not turn off the machine as it was automatic and could not be switched off easily. Mr Park said the noise in his factory has meant that he now suffers from mild hearing loss but not such that he needs a hearing aid.
23. Asked about his business, Mr Park said he now employs only 3 staff but, in 1999 – 2000 when Mr Kang was working with him, he had 12 staff. He explained that, back then, he provided comprehensive services from design, through printing and coating to delivery whereas now he only does part of the process. The downsizing of his business, he

explained, is due to the economic downturn, computers and the fact that he is now 74 years of age. In addition, in 2007 there was a fire at his factory but he got things going again, albeit on a smaller scale.

24. During the hearing, the Tribunal provided Mr Park with the Duty Statement dated 3 August 2009 provided by Mr Kang to both TRA and the Department. Mr Park confirmed that the document was issued by Daehengsa and that the signature on the Duty Statement is his. The Tribunal also discussed with Mr Park the duties of a Graphic Pre-Press Tradesperson ASCO 4911–11 (now Graphic Pre-press Trades Worker ANZSCO 392211). He confirmed that, during his employment, Mr Kang had undertaken all of the tasks for the occupation as set out in ANZSCO.
25. The Tribunal found Mr Park to be a credible and convincing witness. The Tribunal accepts Mr Park's explanation of the circumstances surrounding the misinformation that he provided to the officer in December 2015. It also accepts that Mr Park endeavoured to assist Mr Kang respond to the Department's invitation of 18 December 2015 with his letter of 5 January 2016. A further copy of the letter was provided to the Tribunal and Mr Park's oral evidence essentially confirms and elaborates on the contents of that letter.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

26. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act: see the Attachment to this decision. In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
27. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
28. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
29. Having considered the evidence provided - in particular, the oral evidence of Mr Park - the Tribunal finds there is no evidence of a bogus document or false and misleading information being provided either to TRA or the Department.
30. Therefore, Mr Kang meets cl.4020(1) of Schedule 4 to the Regulations.
31. On the basis of the above, the first named applicant satisfies PIC 4020 for the purposes of cl.886.225 of Schedule 2 to the Regulations.

DECISION

32. The Tribunal remits the applications for Skilled (Residence) (Class VB) visas for

33. reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 886 (Skilled - Sponsored) visas:

- Public Interest Criterion 4020 for the purposes of cl.886.225 of Schedule 2 to the Regulations.

Katie Malyon
Member

ATTACHMENT

EXTRACT FROM THE *MIGRATION ACT 1958*

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

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bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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EXTRACT FROM THE *MIGRATION REGULATIONS 1994*

SCHEDULE 4

- 4020** (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.

- (5) In this clause:
information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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